U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-S- INC.

DATE: SEPT. 12, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of software development and database administration services, seeks to permanently employ the Beneficiary as a database administrator. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This classification allows a U.S. employer to sponsor a member of the professions holding an advanced degree for lawful permanent resident status.

On July 13, 2015, the Director, Texas Service Center, denied the petition. The Director concluded that the record did not establish the Beneficiary's possession of the required education or experience for the offered position.

The matter is now before us on appeal. The Petitioner asserts that the Director ignored evidence of the Beneficiary's qualifications. Upon *de novo* review, we will dismiss the appeal.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[1] The priority date of the petition is April 25, 2013.[2]

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's degree.
H.4B Major Field of Study: Computer Science or Information Technology.
H.5. Training: None required.
H.6. Experience in the job offered: 12 months.
H.7. Alternate field of study: Engineering, Electronics, or equivalent.

[1] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).
[2] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: Any suitable title having similar duties and skills.
H.14. Specific skills or other requirements: Master's degree or equivalent and one year experience in the required job and technology. Travel required.

The Beneficiary attested on the accompanying labor certification to his receipt of a master's degree in computer science from India, in 2005. The record contains copies of a master of computer applications degree and marks cards from that university, indicating the Beneficiary's receipt of the 3-year master's degree in 2005. The record also contains copies of a bachelor of science degree and marks certificates from India, indicating the Beneficiary's receipt of a 3-year baccalaureate degree in 2002.

Part K of the labor certification states that the beneficiary worked for in India, as a database administrator from August 1, 2006, to August 31, 2008. It also states that the Beneficiary was employed by the Petitioner in the offered position of database administrator from June 1, 2010, until the petition's priority date of April 25, 2013.

The Petitioner submitted a copy of a September 1, 2008, "experience certificate" on the stationery of The certificate stated employment of the Beneficiary as a database administrator from August 2006 to August 2008 and described his job duties. The Petitioner also submitted an original May 30, 2015, certificate from The certificate is virtually identical to the copy of the 2008 certificate, except that it contains the name and title of the employer.

In an August 5, 2015, affidavit, the Petitioner's president asserted that the company began employing the Beneficiary in April 2010 as a systems analyst, and that the Beneficiary later started working for the Petitioner in the offered position of database administrator.

II. LAW AND ANALYSIS

A. USCIS Determines the Beneficiary's Qualifications for the Offered Position

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the foreign national must apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

By approving the accompanying labor certification in the instant case, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position of database administrator. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(II).

All matters regarding preference classification not expressly delegated to the DOL remain within USCIS' authority. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983). Thus, the issues before us are whether the Beneficiary meets the educational and experience requirements of the offered position certified by the DOL.

B. The Record Establishes the Beneficiary's Qualifying Education for the Offered Position

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany,* 696 F.2d at 1012-13; *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

The Director found that the record did not establish the Beneficiary's qualifying education for the offered position. Based on our review of the evidence in the record, including the Petitioner's recruitment for the proffered job, the Petitioner has established that the Beneficiary meets the educational requirements for the offered position. We will therefore withdraw the Director's contrary finding on this issue.[3]

C. The Record Does Not Establish the Beneficiary's Qualifying Experience for the Offered Position

A petitioner must support a beneficiary's claimed qualifying experience with letters from employers. 8 C.F.R. § 204.5(g)(1). The letters must include the employers' names, addresses, and titles, and descriptions of a beneficiary's experience. *Id.*

[3] The Director's notice of intent deny (NOID) of May 28, 2015 noted that, in a nonimmigrant visa application in August 2008, the Beneficiary indicated his possession of only a bachelor's degree, not a master's degree. But USCIS officers in New Delhi, India later confirmed the Beneficiary's receipt of the 2005 master of computer applications degree. Thus, the Beneficiary's statement in the nonimmigrant visa application does not cast doubt on his educational qualifications for the offered position.

The Petitioner initially submitted a copy of a September 1, 2008, "experience certificate" on the stationery of [redacted] The certificate stated [redacted] employment of the Beneficiary as a database administrator from August 2006 to August 2008 and described his job duties.

As noted in the Director's NOID, the copy of the [redacted] certificate did not establish the Beneficiary's qualifying experience for the offered position. Contrary to 8 C.F.R. § 204.5(g)(1), the letter did not include the employer's name and title.

The NOID also noted a discrepancy in the Beneficiary's claimed qualifying experience. In a nonimmigrant visa application in July 2008, the Beneficiary stated that he then worked at his father's motorcycle parts store. On the accompanying labor certification, the Beneficiary stated his full-time employment by [redacted] from August 1, 2006, to August 31, 2008.

A petitioner bears the burden of establishing eligibility for the benefit sought. Section 291 of the Act; 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The instant Petitioner must resolve the discrepancy in the Beneficiary's claimed employment from August 1, 2006, to August 31, 2008, by independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In response to the NOID, the Petitioner submitted a May 30, 2015, certificate from [redacted] The new, original certificate is virtually identical to the copy of the 2008 certificate, except that it contains the name and title of the employer. The [redacted] certificates do not indicate its employment of the Beneficiary on a full-time basis.

On appeal, the Petitioner also submitted an August 4, 2015, affidavit of the Beneficiary stating that he could not find the original 2008 certificate from [redacted] or his pay statements from [redacted] The Beneficiary confirmed his employment by [redacted] from August 2006 to August 2008. He acknowledged that, as of July 2008, his father operated a motorcycle parts business and that he helped his father with the business "in [his] spare time." The Beneficiary stated that, when he applied for the nonimmigrant visa, he is "not sure" what he told U.S. consular officials. He stated: "Perhaps I misunderstood the question and informed [them] that I am [a] graduate and working with my father."

The evidence submitted by the Petitioner does not resolve the discrepancies in the Beneficiary's claimed qualifying experience with [redacted] The Petitioner has not demonstrated the Beneficiary's full-time employment by [redacted] for at least 1 year as specified on the accompanying labor certification.

The record also does not indicate for how many months and hours per week the Beneficiary worked at his father's business while working for [redacted] If the Beneficiary did not work for [redacted] for as many months or hours as he claimed on the labor certification, he may not possess the required amount of qualifying experience. *See Matter of Cable Television Labs., Inc.*, 2012-PER-00449, 2014 WL 5478115 (BALCA Oct. 23, 2014) (holding that, for labor certification purposes, 16 months of part-time experience equates to only 8 months of full-time experience).

The Beneficiary stated that he could not find his payroll records from [redacted] But the record does not indicate whether he tried to obtain copies of those records from [redacted] or if tax records would confirm his claimed employment by the company. The Petitioner has not demonstrated with independent, objective evidence that the Beneficiary was employed full-time for at least 1 year as a database administrator by [redacted]

In addition, although a labor certification employer generally cannot rely on experience gained by a foreign national with it, the Petitioner asserts that its employment of the Beneficiary provided him with qualifying experience. In an August 5, 2015, affidavit, the Petitioner's president asserted that the company began employing the Beneficiary in April 2010 in a position substantially different from the offered position. *See* 20 C.F.R. § 656.17(i)(3)(i) (allowing an employer to rely on qualifying experience gained with it if the experience occurred in a position "not substantially comparable" to the offered position).

In a letter dated June 11, 2015, the Petitioner's president stated that the Beneficiary served as a "systems analyst/database administrator" from June 1, 2010, to September 30, 2012, before working in the offered position of database administrator. The president stated that the ETA Form 9089 lists only the Beneficiary's experience in the offered position because the form lacked space to describe both positions. The affidavit of the Petitioner's president conflicts with a letter from the Petitioner's counsel dated January 14, 2014, submitted with the petition stating that the Beneficiary has been employed with the Petitioner as a database administrator since June 2010. It also conflicts with the affidavit of the Petitioner's President dated August 5, 2015, which states that the Beneficiary has been working with the Petitioner since April 2010, "earlier as a Systems Analyst then Database Administrator." The Petitioner has not resolved the inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. at 591-592. The record does not establish that the Beneficiary worked at least 1 year as a systems analyst.

The record does not support the Petitioner's assertion that the Beneficiary gained qualifying experience with it in a substantially different position. A determination of whether positions are substantially different requires a comparison of their job duties. *See* 20 C.F.R. § 656.17(i)(5)(ii) (defining a "substantially comparable" position as one requiring performance of the same job duties more than 50 percent of the time). The instant record does not indicate the Beneficiary's job duties as a system analyst. The record therefore does not establish that the positions were substantially different.

In addition, the omission of the Beneficiary's purported qualifying employment by the Petitioner on the ETA Form 9089 casts doubt on the validity of the claimed experience. *See Matter of Leung*, 16 I&N Dec. 12, 14-15 (Distr. Dir. 1976), *disapproved of on other grounds by Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978) (finding testimony of qualifying employment by an applicant for adjustment of status to be not credible where the underlying labor certification did not state the experience).

We reject the Petitioner's assertion that the ETA Form 9089 lacked sufficient space to list the Beneficiary's employment as a systems analyst. Part K of the form requires the Beneficiary to list "all jobs" he has held during the prior 3 years and any other qualifying experience. The form contains space for the listing of three jobs; but addenda pages are also available. The space listing "Job Three" was left blank and could have been completed to reflect the Beneficiary's additional employment as a systems analyst with the Petitioner. Further, the Petitioner utilized an addendum to the labor condition to describe job duties from Parts. H.11. and K.9. – Job 1. An extra addendum could have been utilized to reflect the Beneficiary's additional employment as a systems analyst. Therefore, the Beneficiary could have listed his experience as a systems analyst with the Petitioner on the ETA Form 9089.

For the foregoing reasons, the record does not establish the Beneficiary's qualifying experience for the offered position as specified on the accompanying labor certification by the petition's priority date.

III. CONCLUSION

The record establishes the Beneficiary's possession of the required education for the offered position. We will therefore withdraw that portion of the decision. But the record does not establish the Beneficiary's qualifying experience for the offered position. We will therefore dismiss the appeal.

As previously indicated, in visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act; *Otiende*, 26 I&N Dec. at 128. Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of D-S- Inc.*, ID# 16858 (AAO Sept. 12, 2016)